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18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA
20 WESTERN DIVISION

21
22 AMERICAN TRUCKING
ASSOCIATIONS, INC.,
23 Plaintiff,
24 v.
25 CITY OF LOS ANGELES, et al.,
26 Defendants.

27 Case No. CV 08-04920 CAS (CTx)
Honorable Christina A. Snyder
**DEFENDANTS' OPPOSITION TO
THE NATIONAL RETAIL
FEDERATION MOTION TO
PARTICIPATE AS *AMICUS CURIAE***

28 Date: September 8, 2008
Time: 10:00 am
Place: Courtroom 5

1 Defendants the City of Los Angeles, the Los Angeles Harbor Department,
 2 the Los Angeles Board of Harbor Commissioners, the City of Long Beach, the
 3 Long Beach Harbor Department and the Long Beach Board of Harbor
 4 Commissioners' (collectively the "Ports") hereby respectfully submit their
 5 Opposition to the National Retail Federation's ("NRF") Motion to Participate as
 6 *Amicus Curiae* ("Motion"). As the Court is aware, Plaintiff American Trucking
 7 Associations' ("ATA") Motion for Preliminary Injunction seeking to enjoin the
 8 Ports' Clean Truck Program's ("CTP") concession contracts is set to be heard on
 9 Monday, September 8, 2008. The NRF seeks to support the ATA's request for a
 10 preliminary injunction. The Ports oppose the NRF's participation at this stage of
 11 the case for the following two reasons:

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14 **A. The NRF's brief is untimely and seeks to game the system by
 15 denying the Ports adequate time to respond to NRF.**

16 It is well-established in the Ninth Circuit that a "motion for leave to file an
 17 *amicus curiae* brief . . . should not be granted unless the court 'deems the proffered
 18 information timely . . .'" *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982).
 19 Accordingly, NRF's attempts to insert themselves into the preliminary injunction
 20 process nearly two weeks after the ATA filed its complaint and moved for a
 21 preliminary injunction should not be allowed. As Defendants explained to NRF's
 22 counsel, *see Declaration of Brent Caslin ¶ 3, Ex. B* (Steven Rosenthal August 8,
 23 2008 email to Jeffrey Clark), the preliminary injunction briefing schedule and brief
 24 page limits were established prior to the NRF's seeking Defendants' consent to
 25 participate in this case. The Ports made clear to NRF's counsel that there was not
 26 enough time or brief length for the Ports to adequately respond to their proposed
 27 late-filed *amicus* brief and that, therefore, the Defendants' could not consent to the
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1 NRF's request. This is even more true today given the brief NRF lodged with the
 2 Court.

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4 Under the guise of seeking "to participate in this case as a friend of the
 5 Court" and to offer a "unique and distinct perspective," Motion at 4:7; 3:11, the
 6 NRF has submitted as exhibits two economic studies of the drayage market at the
 7 Ports, neither of which Plaintiff, American Trucking Associations ("ATA") saw fit
 8 to raise in its Motion for Preliminary injunction. In addition to the supplementary
 9 documentary evidence, the NRF raised a legal argument regarding the "market
 10 participant doctrine" the ATA utterly failed to address in its opening papers.
 11 Finally, the NRF submitted this additional evidence and legal discussion on August
 12 18, 2008 — two days before the Ports' opposition brief was due on August 20,
 13 2008.

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15 NRF's tactics can only be intended to game the system and to leave the Ports
 16 with inadequate time to substantively respond to the issues raised by NRF's papers.
 17 NRF's foot-dragging should not be allowed to prejudice defendants at this late
 18 stage of the preliminary injunction process. For this reason alone, NRF's Motion
 19 should be denied and the brief removed from the case record.

20

21 **B. The NRF's brief does not contribute anything necessary to the**
 22 **resolution of the pending motion for preliminary injunction.**

23 In addition to gaming the system, NRF's brief does not contribute anything
 24 necessary or relevant to the question of whether a preliminary injunction should
 25 issue. As other district courts have observed, *Amicus* "participation at the trial, as
 26 opposed to the appellate level, is more the exception than the rule." *Abu-Jamal v.*
 27 *Price*, 1996 U.S. Dist. LEXIS 8597 (W.D. Pa. 1996); *see also Yip v. Pagano*, 606
 28 F. Supp. 1566, 1568 (D.N.J. 1985) ("[a]t the trial level, where issues of fact as well

1 as law predominate, the aid of *amicus curiae* may be less appropriate than at the
 2 appellate level where such participation has become standard procedure."); *News &*
 3 *Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 31 (S.D. Fla. 1988) ("acceptance of an . . .
 4 . *amicus curiae* should be allowed only sparingly"). *Amicus* participation at the
 5 preliminary injunction stage is even more exceptional. It is warranted, therefore,
 6 only when the party seeking *amicus* status can provide special insights specific to
 7 the injunction under consideration. *See O Centro Espirita Beneficente Uniao do*
 8 *Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271, 1274 (D.N.M. 2002) (denying an
 9 organization's motion to file an *amicus* brief as untimely and unhelpful in deciding
 10 plaintiffs' Motion for Preliminary Injunction).

11
 12 NRF states that it should be granted permission to participate as *amicus*
 13 because of the "unique perspective that the NRF can bring to this litigation as the
 14 owners of the beneficial cargo that would bear the brunt of the economic burden of
 15 the Concession Plans." This justification presumably explains why NRF submitted
 16 exhibits regarding recent downward trends in retail sales. While Defendants do not
 17 comment on whether the NRF has stated adequate grounds to participate in this
 18 case at the merits stage, or whether evidence of slowing retail sales or other
 19 testimony regarding economic burdens borne by retailers is ultimately relevant to
 20 the claims in Plaintiff's complaint, it is utterly irrelevant to the questions before the
 21 Court at the preliminary injunction stage, namely: (1) is ATA is likely to succeed
 22 on the merits of its claims and (2) whether, in balancing the equities, the alleged
 23 harms to ATA's members if an injunction does not issue outweighs the harms to the
 24 Ports in the event an injunction is issued. Certainly, ATA's counsel alone can
 25 speak to the harms alleged by ATA members and, with respect to the consideration
 26 of the merits, the NRF lacks the ATA's expertise with respect to the federal statute
 27 at issue. The NRF's efforts to participate as *amicus* at this stage of the case should
 28 be denied and their brief removed from the record of this case.

1 For the above stated reasons, Defendants respectfully request that National
2 Retailers Federation's Motion to Participate as *Amicus Curiae* be denied. If the
3 Court grants the Motion, Defendants request leave to file a response within two
4 business days of the order granting the Motion.

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7 Dated: August 22, 2008

Respectfully submitted,

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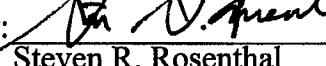
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By: /s/
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